EMPLOYMENT TRIBUNALS

Claimant: **Mr L McClelland**

Respondent: **Blade Motorcycles Limited**

Heard at: **Bristol (by Video)** **On:** **10, 11, 12 and 13 May 2021**

Before: Employment Judge Midgley
Mr H Launder
Mr H Beese

Appearances
For the Claimant: In person, supported by Mrs K Godwin
For the Respondent: Mrs L Bamford, HR Manager for the Respondent

JUDGMENT having been sent to the parties on 14 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claims and Parties

1. By a claim form presented to the Tribunal on 2 February 2020, the claimant brought claims of unfair dismissal and discrimination in respect of the protected characteristic of disability.

2. By a response presented on or before 5 March 2020, the respondent defended all of the claims. There had previously been a period of conciliation in which ACAS was notified of the dispute on 5 December and a certificate of early conciliation was produced on 5 January 2020, although no agreement had been reached at that stage.

3. The claim of unfair dismissal was struck out on 30 March 2020 as the claimant lacked the necessary two years continuity of employment to bring the claim.

<u>The parties</u>

4. The respondent is a company which holds several motorcycle manufacturers franchises including that for Triumph. It has both a sales and an after sales department.

5. The claimant was employed by the respondent as a semi-skilled Motorcycle Technician from 11 June 2018 until his dismissal on 11 October 2019.

6. At the time of the commencement claimant's employment by the respondent in June 2018, he was approximately 28 and had had nearly ten years experience in an amateur setting building and servicing and maintaining motorcycles.

Procedure, hearing, and evidence.

7. The hearing was conducted by CVP. We were provided with the following documents to consider during the hearing:

   7.1. A statement and a chronology from the claimant

   7.2. A bundle of documents prepared by the respondent of 102 pages which included statements (in an informal form) of Mr Trotman and Mr Roberts.

8. The grounds of response, which was amongst those documents, consisted of a statement which was signed by both Mr Trotman and Mr Roberts. In addition, the respondent relied upon an email from Mr Roberts to Mrs Bamford dated 7 January 2020 in which he responded to questions derived from the ET1 and a further email dated 11 February 2020 again sent by Mr Roberts to Mrs Bamford responding to matters in the ET1. Finally, Mr Roberts had produced a one page document dated 15 January 2021. It was agreed that all of them should be treated as the statement of Mr Roberts and he gave evidence by affirmation and confirmed that the contents of those documents were true.

9. Mr Trotman's statement was treated as the jointly signed document attached the ET3 and a one-page document which was included within the bundle. He gave evidence by affirmation and confirmed that the content of each of those documents was true.

10. The claimant gave evidence by affirmation.

11. All of the witnesses answered questions from the opposing party and from us. We heard submissions from Mrs Bamford and the claimant made submissions expanding up a written document he had preparing containing his closing arguments.

The Issues

12. The issues for the Tribunal to determine were identified by Regional Employment Judge Pirani at the Case Management Hearing on the 26 August 2020. At the outset of the hearing, following a discussion with the parties, they consented to those issues being amended as follows:

    12.1. PCPs: The policies, criterions or practices that were relied upon and which are admitted for the purposes of the claim are as follows:

        12.1.1. Firstly, a requirement to fulfil the duties contained in an employee's job description within specified times, those duties being the completion of pre-delivery instructions, the performance of motorcycle services and conducting first service procedures and fitting of accessories.

12.1.2. Secondly, a requirement that all employees should attend work in accordance with an employee's contractual hours.

Relevant Background Facts.

13. We make the following unanimous findings in light of the evidence that we have heard and the documents that we have read on the balance of probabilities.

The claimant's disability

14. The claimant suffers from the conditions of Asperger's and connected anxiety which is accepted to be a disability for the purposes of the Equality Act. The relevant effects of that condition upon the claimant for the purposes of this claim may be described as follows (these are derived from the Case Management summary of Employment Judge Pirani dated 26 August and the claimant's disability impact statement and the supporting medical evidence which led to the respondent's concession of disability):

    14.1. A propensity to interpret language and communications literally,

    14.2. A lack, at times, of social awareness,

    14.3. A reduced ability to process information particularly in a busy or noisy environment, in consequence the claimant has a preference for written instructions.

    14.4. An extreme attention to detail, known as monotropism, which can cause impairment to his time management.

15. Each of those matters generally adds to the claimant's prevailing sense of anxiety and creates something of a vicious circle, given that anxiety exacerbates the claimant's condition.

16. The claimant was employed by the respondent as a semi-skilled Motorcycle Technician from 11 June 2018 until his dismissal on 11 October 2019.

17. At the time of the commencement claimant's employment by the respondent in June 2018, he was approximately 28 and had had nearly ten years' experience in an amateur setting building and servicing and maintaining motorcycles.

The claimant's appointment

18. The claimant's employment came about following an interview with the Dealer Principal, Darren Neill, at the respondent's premises in Swindon. Also, in attendance at the interview was the Triumph After Sales Manager, John Jefferies. It was agreed at that interview that the claimant would shadow a staff member in the multi franchise workshop as a trial to see how he progressed and that an offer of employment may be made consequent to that.

19. In the event the claimant performed well during that assessment and on 11 June 2018, his employment began in the role of Semi-skilled Motorcycle Technician at the Swindon department.

20. Approximately two weeks after the claimant started, he was given a series of forms to complete. They consisted of an application form, an 'Equal

Opportunities' form, and a 'new employee's starter form'. The respondent accepts that it received the equal opportunities form and the new employee's starter form, it does not accept that it received the application form. The relevant matters within those forms for the purposes of these claims are as follows:

21. Firstly, on the equal opportunities form, the claimant had in error failed to tick the box indicating that he had a disability. On the application form, however, the claimant had indicated that he had Asperger's and consequent anxiety.

22. There was a dispute before the Tribunal as to whether the respondent received the application form containing the disclosure of the disability in this case. On balance the Tribunal finds that it did. The claimant's evidence was that he had given the form to Mr Jefferies. The respondent accepts that the other forms were received. Whilst we accept that the application form had not been completed in the relevant section by the respondent, we did not hear any evidence from Mr Jefferies disputing the claimant's account that he had returned the form to him, and the respondent advanced no argument as to why the form had not been received. In addition, the respondent's subsequent conduct was consistent with knowledge of the claimant's Asperger's. We therefore find on balance that the claimant gave the form to Mr Jefferies but either Mr Jefferies mislaid it or did not pass it on to the respondent's HR department. In consequence there was no formal record in the respondent's systems or in the claimant's personnel file of the condition.

The claimant's role and his functions.

23. We take these from the claimant's description in paragraph 4 of his statement. In essence his role involved taking delivery of motorcycles from hauliers, de-crating motorcycles and conducting and performing their initial assembly, carrying out pre-delivery inspections ("PDIs"), performing first and early interval services, and undertaking some repairs and some accessory fits.

24. In September 2018, the claimant's commute to work became increasingly difficult. He had moved to reside in Malvern and therefore he had an approximate 60-mile round trip to and from his place of work in Swindon. The claimant discussed the difficulties of that commute with Mr Neill. In approximately October 2018, the claimant also approached Mr Jefferies to discuss the possibility of reducing his hours in order to alleviate the stress and anxiety that he suffered as a consequence of the commute. Mr Jefferies agreed in or about October 2018 that the claimant could forgo his Saturday shifts but that he would continue to work on the weekday shifts.

The claimant's transfer to the Cheltenham branch.

25. As a consequence of the claimant's distance from Swindon, it was agreed that an enquiry would be made to see whether a reasonable adjustment could be made to permit the claimant to be transferred to a different branch of the respondent. Consequently, in December 2018, the claimant visited the respondent's Cheltenham's office. At the time of his visit, the staff at the office had not been informed of the claimant's Asperger's. There was no record on the personnel file and there is no evidence before us that either Mr Jefferies or Mr Neill communicated their knowledge of the disability to those at the Cheltenham branch.

26. At that time there were a number of individuals employed in the management structure and other structures at the branch: Mr Chris Waldrom was the Motorcycle Division Manager, Mr Max Roberts was the Dealer Principal, Mr Ian West was the Workshop Manager, Mr Christopher Trotman was the Service Manager, and the leading Service Technician was Anthony Brock, who had won an award as the best Service Technician nationwide for Triumph. Assisting him was Jake Williams, another qualified and very experienced Technician.

27. The claimant and (later in the events as described below) an individual named as Fraser were employed as Semi-skilled Motorcycle Technicians. Fraser had some significant experience, firstly working as a qualified Technician of BMW and also for an engine cleaning firm.

28. The claimant was viewed by the respondent as being an experienced Semi-skilled Service Technician because of his experience at Swindon and his qualifications.

The Cheltenham office.

29. The is no dispute is that the environment and way of working differed between the Cheltenham and Swindon branches. In particular, the Cheltenham branch sought to be more meticulous in its servicing and its preparation of motorbikes, so as to set a gold standard.

30. As a consequence, the respondent's management team determined that the claimant should be permitted a period of approximately two months to acclimatize to the new environment and working practices following his transfer. During that time, as with all technicians, the claimant was to be supported through a system of buddy checks which were to be conducted by Mr Anthony Brock and Mr Jake Williams. The claimant was therefore initially placed in a workshop together with Mr Brock and Mr Williams. It was a very busy environment, particularly in the summer months which began in late March or early April and ran through until late July or early August. It was busy because of the high level of sales and servicing and, therefore, the high level of PDIs as members of the public bought and serviced motorcycles in anticipation of and readiness for the more clement weather to come.

Buddy Checks

31. The nature of the buddy checks was as follows:

32. For each PDI there was a manufacturer's checklist listing the tasks required and the specified times for them. The claimant was be required to complete the PDIs which would then be reviewed by Mr Brock or Mr Williams to ensure that they were completed to the necessary standard and, insofar as possible, in accordance with the manufacturers' specified time frames. Any errors or practice matters that required improvement would be addressed with the claimant by Mr Brock or Mr Williams.

33. A similar buddy system operated in respect of servicing. Again, there was a check list for services and again the claimant's work on services was reviewed with the claimant by Mr Brock and Mr Williams.

Training

34. The respondent adopts two types of training that are of relevance to this claim. Firstly, online learning which is designed and provided by Triumph in a series of online courses. There is no dispute that the claimant completed all the necessary modules. Once those are completed the normal course is for the technician to progress to face-to-face training courses addressing more technical and advanced matters. Such courses tend to be offered on a seasonal basis given the demands on trainers because of the high levels of servicing in the busy summer months. Therefore, in practice, they tend to be arranged outside the peak season. That is not a matter that any individual manager within the Cheltenham branch or any other had any control over.

Events following the claimant's transfer - performance

35. Following the claimant's transfer to the Cheltenham branch, in January 2019, the claimant was blessed by the birth of his son and he took two weeks off as a mixture of leave and annual leave. However, through the months of January and February, the respondent experienced increasing concerns in relation to the claimant's performance.

36. Firstly, there were issues of lateness. Whilst there were numerous road works on the M5 which affected the claimant's route to work and in addition, regrettably, he suffered a fire in the van that he used to commute to work and was forced to commute by motorcycle, the claimant developed a consistent habit of arriving late by approximately twenty minutes or more on a regular basis.

37. There were two consequences of such lateness. First, in relation to the claimant himself the lateness caused him to become stressed and anxious, which exacerbated the other effects of his Asperger's and anxiety. The claimant struggled with time management particularly in the mornings and became anxious when trying to plan his route to work to avoid the roadworks, which could further delay his departure and compound his lateness. However, during his evidence the claimant stated that the roadworks were the major factor in his lateness, rather than his Asperger's, although it remained a factor. The Asperger's was, we find, a relatively limited cause of the claimant's lateness, although a significant cause of his anxiety about that lateness.

38. Secondly, the claimant's late attendance had a significant impact on the respondent and its operations. The respondent had to meet customers' expectations both in terms of building new motorcycles and in completing services and repairs within the time frames that had been specified in accordance with the manufacture's specifications. In consequence, other employees were required to ready the bikes for the claimant, moving them to the workshop or to the area of the ramp or un-crating them as the need arose.

39. Mr Trotman regularly addressed the fact of the claimant's lateness with him, as did Mr Roberts. Mr Trotman, in particular suggesting to the claimant that he might leave very early so as to avoid the traffic and avoid the cause of his anxiety, as Mr Trotman himself did. The claimant did not or could not follow that advice and thus it did not resolve the ongoing issue of the claimant's lateness and the problem persisted.

40. The second area of the claimant's performance which caused concern to the respondent were repeated errors he made when undertaking PDIs and, to a

lesser extent, services. We accepted Mr Trotman's evidence that if the claimant were to conduct approximately hundred PDIs, there would be errors requiring rectification in approximately sixty of them. There were two particular common errors, firstly, a failure to correct or set clock times and secondly, setting the chain tensioning incorrectly.

41. Mr Trotman regularly raised these matters with the claimant and, as a consequence of the claimant's repeated mistakes, he increasingly tended to lean to the view that the errors were caused because that the claimant simply was not listening to his instructions. That was a cause of frustration to him given the pressures the team was under.

The workshop moves and other adjustments

42. In February 2019, those matters came to a head, leading to a meeting which was attended by the claimant, Mr Roberts and Mr Waldron. They discussed both facts of the lateness and errors with the PDIs with the claimant. It was during this discussion that the claimant raised what he believed the respondent already knew namely the consequence of his Asperger's.

43. Regrettably, the respondent did not at that stage seek any professional advice as to the nature of the condition or its effects or the necessary adjustments that might be required in relation to the claimant's tasks or duties. Nor did they seek any advice from their internal Human Resources department or make a referral to an Occupational Health Specialist or other external organisation. We find that would have clearly been the best course and it troubles us that it was not taken. Nevertheless, we must consider what actually was done. There was a discussion with the claimant as to the condition and its effects upon him and what could be done to assist. Because the respondent did not have professional advice it did not appreciate the claimant's condition could at times cause through its anxiety a reluctance to challenge or to stand up to authority and a tendency (as he described it to us) to agree to matters that may potentially not assist him through a desire to show good faith or willingness.

44. The respondent reflected on that disclosure and concluded that whilst at work the claimant had appeared to have been distracted on a fairly regular basis both by the radio and the comings and goings of other technicians within the busy workshop. Mr Roberts suggested that the claimant should be moved to a second workshop which was located in close proximity to the main workshop but was a separate building. The claimant was still to have his work reviewed by Mr Brock, Mr Trotman and/or Mr Williams, and each of those individuals would be available to offer support and advice as required, and the buddy system would continue, but it was hoped that the fact that the claimant would be in his own environment would reduce the distractions and therefore enable him to complete the PDIs in accordance with the manufacturer's time specification. The claimant explained the effect of time pressures and his difficulty with time management upon his stress levels. The respondent therefore agreed an adjustment of approximately fifty percent on the manufacturers specified times for the completion of the tasks on the PDI.

45. There was some dispute as to whether the figure of fifty percent was accurate, but we note that the claimant accepts in his witness statement that Mr Trotman told him at one stage that target was fifty percent below the standard of that

expected of a Triumph technician and that, we find, was a reference to the time taken for the specified tasks on the PDIs.

46. However, the claimant did not inform the respondent that he found it difficult to approach Mr Brock with queries, especially if he appeared to be busy, and further that the process of visiting Mr Brock's workshop to see whether he was free not only added to time that the claimant took for each task but also added to his anxiety. The respondent was therefore unaware of this limitation with the buddy system and with the workshop relocation.

47. Throughout the increasingly busy months of April to July, the claimant worked in a workshop on his with the buddy system in place. Consistent concerns were raised with the claimant during 1-2-1 meetings and other informal meetings about his lateness and his performance on the PDIs. Although there was an improvement in one of the summer months in terms of attendance, generally the issue of lateness remained consistent concern.

48. As a consequence, in July 2019, the claimant's anxiety levels (which had been gradually increasing) reached such a level that the claimant needed to consult his GP and was prescribed antidepressants. He made Mr Roberts aware of that fact, but the respondent concluded that the existing measures of the buddy system and the weekly reviews provided sufficient support. However, Mr Roberts decided that in order to assist the claimant, it would be sensible to introduce timesheets which the claimant had to complete daily which Mr Roberts would review with him at weekly meetings.

49. The sheets the complaint was required to complete have been referred to in various different ways, we shall refer to them as 'daily review sheets.' Mr Roberts proposed that the claimant should complete a daily review sheet for each job he was allocating, detailing how long he had spent on each component element or task of a PDI or service. The aim, which regrettably Mr Roberts did not explain to the claimant in a way that his Asperger's permitted him to understand, was in order to identify any specific actions that the claimant consistently exceeded the adjusted specified time for, with the intention that those tasks would be removed from him and, when the quieter winter months permitted, he would be given focussed training in respect of them in order to bring him up to the required standard.

50. However, the claimant found the completion of timesheets an extra physical and mental pressure which added to his increasing stress and anxiety levels. Mr Roberts reviewed the sheets with the claimant on a weekly basis as well as having regular informal meetings with him. During those meetings Mr Roberts regularly asked the claimant whether there was anything else that he could to or put in place to assist him, but the claimant consistently replied there was not and did not raise any concern about the daily review sheets or their effect on him.

51. The only matter that the claimant did raise with Mr Roberts, and it is unclear when precisely he did so, was a reduction to his hours. The claimant did not explain that he hoped that reduced hours would enable him to better manage his anxiety. Mr Roberts declined to make that adjustment, understanding that it was intended to assist the claimant's performance of PDIs and services. The

reasoning for his decision was that the claimant was not completing his PDIs to the necessary standard or within his existing hours, even with the additional time he was permitted for each task. Consequently, Mr Roberts concluded that reducing his working hours would do little to improve the claimant's attendance times or to assist the claimant to perform the PDIs to the necessary standard.

52. In August 2019, as the busy summer period began to quieten down, Mr Roberts' concerns remained. They were recorded in 1-2-1 reviews with the claimant.

Road testing of motorcycles

53. At or about the same time, another technician, Fraser, joined the respondent. Within two or three weeks of joining Fraser was permitted to undertake a road test. Technicians are permitted by the respondent to road test customers' bikes in order to identify any faults that the client's may complain about and/or in order to ensure that the bikes are operating as they are supposed to. However, before they are permitted to do so the respondent requires them to undertake an assessment. In the event the respondent permitted Fraser to be undertake road tests following an assessment by Mr Brock, because the initial errors he had made when completing PDIs and services had largely resolved within two to three weeks of his appointment.

54. Mr Trotman was aware that Fraser had engaged in stunt driving on a public road, namely pulling wheelies on a high-powered motorbike, as he had seen a social media post showing him doing just that. He did not report that matter to Mr Roberts as did not believe that that previous activity should disqualify Fraser from conducting road tests for the respondent or that he would need any particular or more formal assessment to be approved to do so as a consequence. His view was that the road tests were conducted in urban streets as part of a technicians' duties and that was a very different scenario to what someone might do in their own time.

55. Mr Roberts stated that had he been aware of Fraser's actions he would have required him to undergo a more formal assessment and/or training before permitting him to conduct the road test, but, as we have stated Mr Trotman had not told him about it, and he had not seen the social media posts and so took no action in relation to it.

56. The claimant was very keen that he should be assessed and permitted to undertake road tests; he viewed it as a critical part of his development. Mr Roberts had suggested to the claimant that he would arrange for him to be assessed within two to three weeks of him starting in February 2019. However, that did not occur as Mr Roberts' time and energies were taken up by a merger with the respondent, and so he was suggested to the claimant that possibly once the busy summer months had passed, he would look to arrange for the claimant to undergo an assessment at that stage.

57. However, as matters materialised that did not in fact occur. The reasons for that were as follows:

58. Firstly, Mr Roberts had been told that the claimant had crashed or dropped his motorcycle in October 2018 as he arrived on the forecourt of the Swindon premises. That fact had been passed on to Mr Roberts by those at

Cheltenham. As a consequence of that, Mr Roberts' view was that the claimant should be trained and assessed by a local trainer (known as James) given that he would be handling clients' superbikes. He therefore tried to make a booking for that training and assessment. James was very busy given the nature of his services and finding a vacancy was difficult. Secondly, Mr Roberts had consistent concerns with the claimant's performance.

59. The combination of those concerns and James' availability had the effect that the date that was being suggested to the claimant was for regularly pushed back.

60. Ultimately in or about August 2019, Mr Roberts decided that the claimant should not be overloaded with an additional responsibility until such time as he was able to complete the PDIs and services to the respondent's required standards and in accordance with the increased timescales. He therefore informed the claimant of this at or about the same time as Fraser was undertaking his assessment. Both parties agree that the claimant was particularly unhappy with that decision, viewing it as different treatment. It added considerably to the claimant's anxiety and stress levels.

The claimant's dismissal

61. Matters progressed with little changing in terms of the ongoing issues until, on 11 October 2019, matters came to a crisis point. The claimant was summoned without notice or warning to a meeting with Mr Roberts and Mr Trotman. He was not told what the subject of the meeting was to be nor was he told of his right to be represented. He had not at that stage received any official warnings in relation to his performance or his attendance. At the meeting the claimant was asked how he perceived he was performing. The claimant said that he thought he thought he was performing alright, although he accepted that there had been some difficulties.

62. Mr Roberts stated that the respondent's view was that the claimant had consistently underperformed and was therefore not suitable for the role. He was given notice and informed that he was not required to work it. He subsequently received a letter confirming his dismissal on the grounds of underperformance unsuitability for the role.

63. The claimant was not notified in that letter of his right to appeal. The Tribunal observes that the respondent is fortunate indeed in the circumstances of this case that the claimant lacks the necessary continuity of employment for a claim of unfair dismissal. Had such a claim been before us we would inevitably have found that the dismissal was procedurally unfair, and when considering whether to award any uplift to compensation for failing to comply with the ACAS Code of conduct in relation to dismissal would have found that the breaches were so significant that an increase towards the upper permitted level of twenty-five percent would have been appropriate. None of the basic protections within the ACAS Code, with the exception of a meeting were afforded to the claimant. There has been no explanation during the course of the evidence to us as to why that was the case.

64. As we say this is not a claim of unfair dismissal it is a claim on two grounds of discrimination in relation to the protected characteristic of disability.

The relevant law

65. The claimant brings two claims under the Equality Act 2010. The first that the respondent treated him unfavourably because of something arising from his disability (s.15 EQA), the second that the respondent failed to make reasonable adjustments (contrary to s.20 EQA 2010).

66. The relevant law is contained in sections 39 and 15, 20, 12 and s.136 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

s.15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if-
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

s. 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

<u>The reverse burden of proof</u>

67. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on which the court could decide, in the absence of any

other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

68. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

69. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

70. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

71. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

72. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

73. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

74. The Tribunal does not have slavishly to follow the two-stage process in every

case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

75. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

76. In this case the claimant says there were various comments made when he was at Swindon from which we should draw an inference that any unfavourable treatment was because of something arising from his disability, and further it might be open to us to draw an inference from the manner in which he was dismissed, given the lack of process and the lack of explanation from that process.

Detriment and unfavourable treatment (s.15)

77. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

78. The Equality and Human Rights Commission's Code of Practice (2011) observes at 5.7

> "For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage "

And at 4.9

> "'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection, or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable, and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

79. The same approach must be adopted in relation to unfavourable treatment within the meaning of section 15 (see Williams v Trustees of Swansea University Pension & Assurance Scheme and anor per Langstaff J in CA (paras 28-29) of the word "unfavourably", which formulation was approved in the Supreme Court (at para 27):

> "… it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person … The determination of that which is unfavourable involves an assessment in which a broad view is to be taken

and which is to be judged by broad experience of life."

80. In City of York Council v Grosset [2018] EWCA Civ 1105, the Court of Appeal (per Sales LJ) held (at paragraphs 36 and 37) that s.15(1)(a) of the Equality Act 2010 should be interpreted as setting the following two-part test for courts and tribunals to apply:

    80.1. did the alleged discriminator treat the claimant unfavourably because of an identified "something"?

    80.2. if so, did that "something" arise in consequence of the claimant's disability? This is an objective test, and it is therefore irrelevant whether the alleged discriminator did not know that the "something" arose in consequence of the claimant's disability. Also, there does not have to be an immediate causative link between the "something" and the claimant's disability; a relatively wide approach should be taken to the issue of causation.

81. In Pnaiser v NHS England and anor [2016] IRLR 170, EAT, Simler P summarised the proper approach to establishing causation under s.15, as follows:

    81.1. first, the tribunal has to identify whether the claimant was treated unfavourably and by whom;

    81.2. it then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator. An examination of the conscious or subconscious thought processes of the alleged discriminator is likely to be required. The 'something arising in consequence of disability' need not be the main or sole reason for the unfavourable treatment, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it (see also Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16, EAT per Simler P);

    81.3. the tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability, and "the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact" (para. 31(e)).

Justification

82. The burden of establishing the defence of justification lies on the employer.

83. In Homer the Supreme Court considered the necessary elements of and approach to a defence of justification:

"20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> '… the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'

He then went on at [165] to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

24 Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

84. In R (Tigere) v Secretary of State for Business, Innovation and Skills [2016] 1 ALL ER 191, the Supreme Court again identified the need, when considering justification, for a Tribunal to both analyse the justification of the PCP and then carry out an analysis of the discriminatory effect of the relevant measure:

> "It is now well established in a series of cases at this level, beginning with Huang v of State for the Home Dept, Kashmiri v Secretary of State for the Home Dept [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167, and continuing with R (on the application of Aguilar Quila) v Secretary of State for the Home Dept , R (on the application of Bibi) v Secretary of State for the Home Dept [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621, and Bank Mellat v HM Treasury (No 2) [2016] 1 All ER 191 at 204 [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?" (Tigere paragraph 33)."

Failure to make reasonable adjustments

85. A tribunal must consider: (1) the Provision, Criterion or Practice ("PCP") applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer, (2) the identity of non-disabled comparators (where appropriate), and (3) the nature and extent of the substantial disadvantage

suffered by the claimant (Environment Agency v Rowan [2008] ICR 218, EAT.)

86. The burden of proving the PCP, the substantial disadvantage and the steps necessary to remove them rests on the claimant (see HM Prison Service v Johnson [2007] IRLR 951, confirmed in Project Management Institute v Latiff [2007] 579). What a claimant must do is raise the issue as to whether a specific adjustment should have been made, not prove a prima facie case of breach (see Jennings v Barts and the London NHS Trust EAT 0056/12) and the adjustment can be identified, in exceptional circumstances, during the hearing (PMI v Latiff). The Tribunal must, therefore, identify with some particularity the step which an employment should take to remove the disadvantage (HM Prison Service v Johnson)

Provisions, Criterions and Practices

87. The purpose of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT.

88. If the substantial disadvantage complained of is not because of the disability, then the duty to make reasonable adjustments will not arise: Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, [2012] EqLR 634.

89. Tribunals should "set out what it was about the disability of the [claimant] which gave rise to the problems or effects which put him at the substantial disadvantage identified": Chief Constable of West Midlands Police v Gardner EAT 0174/11, para. 53.

The steps to remove the disadvantage

90. The word 'steps' must not be construed unduly restrictively, as the Court of Appeal made clear in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, CA. 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

91. Para. 6.28 of the EHRC's Employment Statutory Code of Practice gives guidance as to the kind of factors which a tribunal might take into account in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. Tribunals are not under a duty to address every factor set out in the Code, but should address directly those factors that they find to be relevant: Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341, EAT. The factors include:

    91.1. whether taking any particular steps would be effective in preventing the substantial disadvantage;

    91.2. the practicability of the step;

    91.3. the financial and other costs of making the adjustment and the extent

of any disruption caused;

91.4. the extent of the employer's financial or other resources;

91.5. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

91.6. the type and size of the employer.

92. An employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage — Lamb v Business Academy Bexley EAT 0226/15.

93. The duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA.

94. There is no duty to consult in relation to the adjustment that should be made, but it will potentially jeopardise an employer's position if it does not consult (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT):

> 'any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so.'

95. A proposed adjustment will not amount to a 'reasonable' adjustment if it has "no prospect" of removing the substantial disadvantage: Romec v Rudham [2007] All ER (D) 04 (Sep), EAT per HHJ McMullen; however, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be "a prospect" (as opposed to "a good prospect" or "a real prospect") of the adjustment removing the disadvantage (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

96. A step which, on its own, may be ineffective might nevertheless be one of several adjustments which, when taken together, could remove or reduce the disadvantage experienced by the disabled person: e.g. Shaw and Co Solicitors v Atkins EAT 0224/08.

Discussion and conclusion

97. We have set out our conclusions in a more explanatory and discursive style that we would usually adopt because we are conscious that the claimant is a litigant in person and may be assisted by such an approach.

Knowledge

98. We also have to consider for both Section 15 and Section 20 claims whether the respondent knew or could reasonably have been expected to know both of the fact of the disability and of those disadvantages. As we have found, the respondent was made aware at approximately the end of June 2018 of the fact of the claimant's Asperger's. Thereafter there was a discussion between the claimant and his managers in the Swindon Office which resulted in the adjustments to the claimant's hours and the proposal for a transfer in approximately October 2018. Certainly, by that time, we conclude that the respondent had knowledge of both of the fact of the Asperger's and of the disadvantages that arose from them. Whilst none of Mr Roberts, Mr Trotman or Mr Waldron knew of those discussions, the could reasonably to have been expected to know of them if the respondent had made a sensible record and passed it on to the managers at the Swindon branch upon the claimant's transfer there. We therefore conclude the respondent knew and could reasonably be expected to have known of the disability and the disadvantages that the claimant suffered in consequence.

Section 15.

99. The claimant raises four matters as acts of unfavourable treatment. Firstly, dismissing him - the respondent accepts that dismissal is unfavourable treatment. Secondly, relocating him to a solitary workshop. Thirdly, failing to train him in road testing or providing further professional training and fourthly, in the requirement to complete the daily worksheets. The respondent disputes that any of the last three were unfavourable treatment.

100. We therefore address each of those in turn.

(i) Moving the claimant to a solitary workshop

101. The respondent says that this was not unfavourable treatment but rather favourable treatment because it was designed to remove the distractions that the claimant experienced and so to assist him with fulfilling his contractual role to the required standard. In addition, the respondent points to the fact that the claimant consented to the move as further evidence of the fact that it was favourable. The claimant for his part says that in relocating him he was moved further from those that he found supportive and of assistance namely Mr Brock and Mr Williams and that that added to his anxiety. Secondly, he argues that it added to his anxiety related to time because it would take time to leave his workshop to move the short distance to the second workshop in order to speak to Mr Brock or Mr Williams and, because they were busy, and he was concerned about interrupting them that also added to his anxiety.

102. As we found in the background findings, the decision to relocate the claimant was made without the benefit of professional advice and whilst the respondent did discuss the reason for the move and its effect with the claimant, we are satisfied that the move to the workshop was unfavourable in the sense of adding slightly to the claimant's anxiety as we have described. That was a 'hurdle' which a reasonable work could reasonably complain about, notwithstanding that the claimant agreed to the move and it was intended by the respondent to be a positive change to assist the claimant. Mr Roberts evidence to us was that that relocation was to be reviewed but we heard no

evidence from him about such a review and it was not put to the claimant that a review actually took place where those concerns could have been addressed. We therefore conclude that relocating him to a solitary workshop was unfavourable treatment.

(ii) Failure to train the claimant for road tests and provide other professional training

103. The respondent's argument is that was not unfavourable treatment but rather it was favourable treatment because it did not wish to overload the claimant with additional tasks at a time when he was struggling both in terms of the speed and the satisfactory completion of the fundamental tasks of the PDIs and services. The claimant says there he was treated differently to Fraser in relation to the road testing. Insofar as the professional training is concerned, the respondent argues that such training is only provided by face-to-face courses and they simply were not available, but the same argument is relied upon in relation to the potential effect of overloading the claimant.

104. Whilst we accept that the claimant was deeply disappointed and felt singled out in relation to his treatment regarding the road testing, on balance we find that the road testing was not unfavourable treatment, and we reach the same conclusion in relation to the decision not to offer further professional training. We accept that the job description describes the prospect of training and ongoing training, but the job description advert is by nature generic. The respondent's managers must make decisions on the facts as they see them in relation to the training needs and capabilities of those that they manage. Here their conclusion that adding tasks to the claimant at a time when he was already struggling was certainly, it seems to us, one that was a reasonable one for an employer to make and was not tainted by discrimination.

105. Our conclusion is that neither were acts of unfavourable treatment. A reasonable worker in those circumstances would have accepted that it was to their benefit not to be overloaded.

(iii) Completion of daily work sheets

106. The respondent's intention, which forms its argument before us, was that the claimant would be assisted by completing the worksheets because if particular functions of the PDIs or services took overly long and that was identified, they would have been removed and the claimant's difficulties with them remedied through training in the quieter winter months. That particular focus was not sufficiently articulated to enable Mr McClelland to understand it. The consequence of the completion of timesheets was that it added both another element of time pressure to which the claimant was vulnerable because of his Asperger's, and therefore added to his stress and anxiety. He did not view it as a supportive measure but rather an oppressive one - that is probably due to the lack of communication, something he referred to in his closing argument.

107. On balance, therefore, looking at it from the prospective of a reasonable worker who had the claimant's anxieties, we find that the requirement to fill out worksheets was unfavourable – it created a further hurdle and source of anxiety.

'because of something arising from disability'

108. We then turn to consider whether the matters that we found to be unfavourable treatment were done because of the symptoms of the claimant's Asperger's syndrome. We address will address the act of dismissal last, given that it where it occurred chronologically.

(i) Relocation to a solitary workshop

109. It is not in dispute that the purpose of the relocation was to remove distractions as it was felt as a consequence of the claimant's Asperger's were potentially slowing him down, therefore, we conclude that that was done because of the claimant's Asperger's.

(ii) Daily work sheets

110. In the same way, the requirement to complete timesheets was done because the respondent knew of the claimant's difficulties with time, knew of his propensity to focus obsessively on one particular task. Those matters arose because of his Asperger's Therefore, we conclude that the completion of timesheets arose from the symptoms of the claimant's Asperger's.

(iii) Dismissal

111. We turn to the question of dismissal. We will deal with that in the general context of the justification defence and incorporate the necessary conclusions in relation to whether it was because of matters arising from the Asperger's syndrome.

Justification

112. The next stage is to consider justification in relation to each of the two unfavourable actions of relocation and the completion of worksheets. The legitimate aim that the respondent relies upon is to be described as follows:

113. Recognising that Mrs Bamford is not a legally qualified representative, and she did not precisely articulate it, we understand that the legitimate aim relied upon is the requirement to complete the preparation of bikes following sale and/or to complete services in accordance with manufacturers specifications both in terms of quality and time and in a timely fashion to meet client expectations. The business need is the need to ensure that the respondent provides the appropriate level of service in a competitive market. The question therefore is whether relocating the claimant to the workshop and requiring him to complete worksheets was a proportionate means of achieving that aim when balancing its discriminatory effect as against the business needs as we have described them. Again, we take each in turn.

114. Seeking to avoid repeating matters that we have already articulated, the intent and purpose of the move to the workshop was two-fold. Primarily to assist the claimant to focus on his work by removing distractions in order to enable him to meet the business requirements with the completion of PDIs and servicing. Secondly, by doing so to ensure that the respondent was able to meet its obligations. That measure is rationally connected to the legitimate aim and business needs. We bear in mind in reaching our conclusion on this matter that there were regular meetings following that relocation during which any

concerns about it could have been raised by the claimant. We also bear in mind that support that was provided through the buddy system and through the proximity of Mr Brock and Mr Williams continued, albeit with a little more difficulty. The move was intended and understood to be a supportive measure. In those circumstances, on balance, we conclude that the means of achieving the aim was proportionate despite its discriminatory effect and struck a fair balance between the business needs and the claimant' needs. It was therefore it was justified in the circumstances of this case.

115. Secondly, we turn to the completion of the daily worksheets. This was intended to be a supportive measure to enable the claimant to perform to the necessary standard. It is of deep regret that the necessary explanation of that purpose and intent was not communicated by Mr Roberts or anyone else to the claimant and therefore his perception of the step was that it was oppressive and that it added to his stress and anxiety. Our assessment for the purposes of justification must be objective and it is an assessment that is made now rather than at the time. The measure of completing worksheets to identify to asks with which the claimant was struggling was logically connected to the legitimate aim and business need. We find that it was justified because the purpose was to remove aspects of the claimant's work that were causing the overrun of time that were adding to anxiety and in so doing it struck a fair balance between the business's needs and those of the claimant. Whilst there was some increased anxiety in relation to the completion of the worksheets, ultimately, if some of the tasks had been removed because the claimant had consistently overrun with them and the claimant had understood that was the purpose then we suspect that the degree of anxiety that he felt about it would have been ameliorated.

116. We pause to observe one that factor that underlies each of those conclusions is that a significant cause of the claimant's general levels stress and anxiety was his commute and arriving late and the pressures that he put himself under causing him voluntarily to work through his lunch break. That denied him the opportunity to pause and to reset, which may have assisted in the management of his anxiety levels. The issue of promptness is not one that arises as an allegation of unfavourable treatment and is not directly derived from the disability, although the disability plays some part in it. Therefore, we conclude that the claimant's anxiety would have remained at a very high level even had it been explained that the measures detailed above were intended to be supportive. We have also taken into account the fact that the claimant consented to the relocation and did not object to either of the changes in any significant way.

117. We turn then lastly to the question of dismissal and whether that arose from the matters connected to the Asperger's syndrome and whether it was justified. This is a difficult matter in the sense that the precise part of the claimant's Asperger's had to play in the difficulties in completing the PDIs to the necessary standard and within the necessary time is not readily identifiable, although it is clear that it played some part.

118. The claimant's position to us and his position in evidence is he was completing the PDIs with the necessary technical mechanical competence. The respondent says he was not. We have accepted the respondent's case on that point.

119. The reasons the respondent relies upon for dismissal are the lack of technical and mechanical competence over a period of approximately ten months whilst working at the Cheltenham branch despite a number of supportive measures being put in place to assist the claimant to reach the necessary standards, including a transfer from Swindon. Certainly, the claimant was supported by a significant period of additional time to complete the PDIs and a relatively high level of managerial support (no matter how that was perceived by the claimant) through review of the daily work sheets and 1-2-1 meetings and the relocation to remove distractions. In addition, the respondent says that the claimant remained consistently late, as Mrs Bamford argued, and, whilst that was not the primary cause of the dismissal, it contributed to it. We found the lateness was not primarily caused by the Asperger's but by the road conditions and difficulties with the vehicle fire affecting the claimant's ability to commute.

120. Balancing all those matters together in terms of the discriminatory effect and the business need, we reach the following conclusions. Clearly the respondent has a business need for its technicians to meet the required standards of mechanical and technical competence (and to dismiss those who do not) because that is the expectation of its clients and, clearly, the respondent has a business need to ensure that those activities are conducted within an appropriate time because that is the expectation of clients in a busy and competitive market. Dismissing those who cannot meet such standards is logically connected to that aim but is a discriminatory means of achieving it because those with disabilities are less likely to be able to perform to the required standard and are more likely to be dismissed. The critical issue therefore is whether the respondent struck a fair balance between the discriminatory measure of dismissal and its business needs. In this case where was a period of approximately six or seven months where the performance was reviewed and supportive measures were put in place to assist the claimant to reach the required standards but the respondent failed to follow any sensible or clear capability processes through which it was explained to the claimant that his employment was at risk if he failed to improve. It was clear, however, to the claimant that the respondent regarded his performance both in terms of attendance and delivering PDIs as being unsatisfactory. Ultimately, therefore, whilst decision was finely balance, we conclude that dismissal was a proportionate means of achieving that aim notwithstanding the potential discriminatory effect because of the steps that were taken and the period over which the issues persisted – it is those matters that lead us to conclude that the respondent struck a fair balance between its business needs and the discriminatory effect of dismissal.

121. It follows that our conclusion in relation to the Section 15 claim is that the claim is not well-founded and it is dismissed.

Failure to make reasonable adjustments

122. The respondent accepts that it applied the PCPs as we have described them to the workforce as a whole, namely:

122.1. Firstly, a requirement to fulfil the duties contained in an employee's job description within specified times, those duties being the completion of pre-delivery instructions, the performance of motorcycle services and conducting first service procedures and fitting of accessories.

122.2. Secondly, a requirement that all employees should attend work in accordance with an employee's contractual hours.

123. The respondent further concedes that those PCPs caused the claimant a substantial disadvantage in comparison to someone without his disability because he required clear instructions and needed longer to undertake tasks and that he might suffer anxiety if those adjustments were not made.

124. Therefore, we go onto consider whether the steps that have been proposed would have prevented the disadvantage and if so whether they were in fact taken and, if they were not, whether it was reasonable for the respondent to take them. We address each of the adjustments in turn.

(i) Allowing the claimant to work at a slower pace

125. The claimant largely accepted that such an adjustment was made. He did not put any significant challenge to the respondent's evidence on that point, rather his challenge focussed upon the precise time he was allowed. We note that it was not any part of the claimant's argument to us or his questions to the respondent that he should have had more time permitted for the tasks. Part of the claimant's argument to us was "I was competent both mechanically and technically albeit I made some errors" and in those circumstances it would be difficult to see how the claimant can say *I needed more time beyond that which was permitted even as a consequence of the Asperger's". We therefore conclude that the respondent took the reasonable step of permitting the claimant 50% more time than the manufacturers specified times for tasks on PDIs and services and so complied with the s.20 duty in that respect.

(ii) Giving the claimant training to carry out road testing of the bikes or other professional training.

126. The adjustment must remove the disadvantages that derive from the PCP rather than being of general advantage to an individual employee. Here the disadvantages caused by the first PCP are the difficulty in carrying out tasks without clear instructions, ideally written as list, because without clear instructions the claimant struggles to understand and, secondly, difficulty with time management and therefore requiring longer to undertake the tasks. Without those adjustments in place the claimant struggles to understand what to do and further suffers an increase in anxiety levels.

127. Providing training for road testing is not a step that would remove or addresses any of those disadvantages. Rather, it falls squarely into the category of something that would advantage the claimant generally (being something that the claimant wanted). We note his stated desire to race motorcycles which is in his witness statement; being permitted to road test superbikes is consistent with that aspiration, but it is not something that engages with the disadvantages he suffered because of the PCP. In the same way, professional training would not remove the disadvantage either, moreso in the circumstances where the respondent had ongoing concerns in relation to the claimant's ability to perform his primary duties to the required standards.

(iii) Being more forgiving when the claimant arrived late.

128. This is more finely balanced. The claimant was consistently challenged as to his lateness and that is recorded in the 1-2-1 meetings. The argument before us is whether the respondent disregarded or opted to take no action in relation to such persistent lateness, when it would have done for an employee without disabilities, and so took the step which the claimant argues it should have taken to remove the disadvantage.

129. We conclude that the respondent did take such a step although it did not either expressly do so in relation to the claimant's Asperger's or directly communicate that that is what it was doing to the claimant. We find on balance that that step was taken. Whilst the respondent did not make any reference to the disciplinary process when discussing lateness with the claimant, it is clear to us that the claimant understood that attendance for his contractual hours of work was a requirement, that he consistently failed to arrive on time, and that the respondent required him to but did not discipline him when he did not. Whilst Mr Roberts was not consciously adjusting his practice because of the claimant's Asperger's, he was more lenient with the claimant and more accepting of his lateness than he would have been for others. Whilst lateness was part of the reasons for the claimant's dismissal, the duty to make reasonable adjustment did not require the respondent to disregard all lateness or to take no action. In circumstances where there was persistent lateness with some regularity over a period of approximately ten months, even where the Asperger's was a minor cause, a respondent can still fairly dismiss. There is a point where dismissal is still fair because the period and regularity of lateness in question is such that it is no longer reasonable for the respondent to disregard it. We conclude that that point had been reached here.

The provision of a suitable work location.

130. We understand the claimant's argument to be that he should have been located in a workshop where there was close and immediate support from Mr Brock and Mr Williams. Whilst we accept that the move to the second workshop made that connection more distant and more difficult, the fact remains that even in the claimant's statement he describes that support continuing, albeit it was slightly more difficult for him to access it.

131. The issue for us is simply a question of whether the separate workshop was a suitable location because support was provided, and the claimant was freer of distractions. We are not required, as we were in the s.15 claim, to consider whether in moving the claimant the respondent struck the appropriate balance between a legitimate aim and its discriminatory effect. If the workshop to which the claimant was moved was suitable, because sufficient support were provided, it would follow that the respondent took the necessary step to comply with the section 20 duty. On balance we conclude that reasonable support was provided for the reasons detailed in the paragraph above, and therefore that the respondent took the necessary step.

132. It follows from that, although we accept that the PCPs put the claimant at the disadvantages that he argues, we find that the respondent took the steps that would have removed the disadvantages and all the other steps that were

argued for would not have removed the disadvantages in question. The claim for reasonable adjustments is therefore not well-founded and is also dismissed.

Employment Judge Midgley
Date: 18 June 2021

Reasons sent to the parties: 22 June 2021

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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